LIBRARY
SUPREME COURT, U. S.

MAY 22

No. 71-1274

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARCHIE L. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
SCOTT F. CRAMPTON,
Assistant Attorney General,
JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1274

ARCHIE L. WAINWRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of willfully attempting to evade his income taxes for the years 1961, 1962 and 1963, in violation of 26 U.S.C. 7201. He was sentenced to two years' imprisonment, with the proviso that he be released on probation after 90 days' confinement, and fined $15,000. His conviction was affirmed on appeal, 413 F. 2d 796, and this Court denied certiorari, 396 U.S. 1009. While incarcerated, petitioner filed a motion to vacate judgment under 28 U.S.C. 2255. The district court denied petitioner's motion and the court of ap-

466-020—72

peals affirmed (Pet. App. 13-16). A petition for rehearing was denied without opinion (Pet. App. 17).[1]

The evidence at trial established that petitioner, who operated several service stations during the taxable years in question, had willfully failed to report rebates from suppliers in the aggregate amounts of $24,503.41 for 1961 (Govt. Ex. 40), $39,941.01 for 1962 (Govt. Ex. 40–A), and $13,352.54 for 1963 (Govt. Ex. 40–B). Petitioner also made noncriminal misstatements of gross income and expenses which gave rise to additional civil tax liability; these errors, however, were small in relation to the unreported rebates.[2]

1. Petitioner contends (Pet. 5–10), as he did in his previous petition to this Court (see Petition 15–16, *Wainwright* v. *United States*, No. 723, O.T. 1969, certiorari denied, 396 U.S. 1009), that the jury was incorrectly instructed that (Pet. 4):

> * * * whenever the facts appear beyond a reasonable doubt from the evidence in the case that the accused had signed his tax return, a jury may draw the inference and find that the accused had knowledge of the contents of the return.

---

[1] Since petitioner has now paid his fines and served his jail sentence, this proceeding presumably should now be considered as a petition for a writ of error *coram nobis*. *Mooie* v. *United States*, 329 F. 2d 821 (C.A. 8), certiorari denied, 379 U.S. 858; cf. *United States* v. *Morgan*, 346 U.S. 502.

[2] For a more complete statement of the facts in this case, see Brief for the United States in Opposition 2–4, *Wainwright* v. *United States*, No. 723, O.T. 1969, certiorari denied, 396 U.S. 1009.

This contention was raised on petitioner's first appeal and found to be without substance. 413 F. 2d 796, 801–802. Issues disposed of on direct appeal may not again be raised in a proceeding brought under 28 U.S.C. 2255, at least in the absence of fresh evidence or the intervening enunciation by this Court of retroactively available constitutional relief. *Blackwell* v. *United States*, 429 F. 2d 514 (C.A. 5); *Battaglia* v. *United States*, 428 F. 2d 957 (C.A. 9). No such reason is presented by petitioner for attempting once again to litigate this issue.[3] Moreover, an alleged trial error such as the giving of improper instructions is not properly raised under 28 U.S.C. 2255. *Margoles* v. *United States*, 407 F. 2d 727, 735 (C.A. 7); *Feeney* v. *United States*, 392 F. 2d 541, 543 (C.A. 1).

Furthermore, the instruction was correct in any event. It stated a permissible inference, not a conclusive presumption of knowledge. Such an inference was justified by the fact that immediately above petitioner's signature on each of the returns (Govt. Exs. 2, 3 and 4) appeared the following statement:

> I declare under penalties of perjury that I have examined this return (including accompanying schedules and statements) and believe it is true, correct, and complete.

Such an inference was also especially appropriate in this case, since it had been shown that petitioner had

---

[3] Petitioner does contend (Pet. 6–7) that *United States* v. *Bass*, 425 F. 2d 161 (C.A. 7), creates a conflict among the courts of appeals. However, a conflict arising only after an issue has been fully litigated on direct appeal does not of itself justify relitigation under 28 U.S.C. 2255.

furnished the false information which was used by his accountants in preparing his return (see Brief for the United States in Opposition, *supra*, at 3–4).[4]

2. Petitioner also contends (Pet. 2–3, 10–11) that the government's failure at trial to disclose his non-criminal reporting errors constituted a failure to "disclose and present to the jury all material evidence" as required by *Giglio* v. *United States*, No. 70–29, decided February 24, 1972. However, there is no conflict with *Giglio* here. Any evidence relating to petitioner's additional civil tax liabilities would have had no bearing, direct or indirect, on the question of petitioner's guilt or innocence on the criminal charges; this is in direct contrast with the nature of the undisclosed fact in *Giglio*, which bore upon the credibility of an important prosecution witness. To the contrary, introduction of such evidence of additional tax liability might have harmfully prejudiced petitioner. See *Hartman* v. *United States*, 215 F. 2d 386, 393 (C.A. 8). The court of appeals below correctly noted that "[t]he government had no duty to prove deficiencies not premising the criminal charge and, indeed, any such effort would be laced with potential prejudice" (Pet. App. 15).

Moreover, petitioner's attorneys were knowledgeable in tax matters and were informed of and had access to the report showing civil tax liability: "[i]f,

---

[4] Contrary to petitioner's contention (Pet. 9–10), there is no conflict here with *In re Winship*, 397 U.S. 358. That decision simply requires that every element of a crime be proved beyond a reasonable doubt and, as the court of appeals below correctly concluded, such proof was made here (Pet. App. 16).

as is now contended, such further evidence would have benefited [petitioner] that conclusion points only to misplaced trial strategy" (*ibid.*). Petitioner, having litigated pursuant to one strategy, cannot now put forward a different strategy on collateral attack.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
JOHN P. BURKE,
RICHARD B. BUHRMAN,
Attorneys.

MAY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972